

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CRAIG JAMES SANFORD,)	
)	No. CV-09-3059-JPH
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE, Commissioner)	
of Social Security,)	
)	
Defendant.)	
)	
)	

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on September 24, 2010 (Ct. Rec. 15, 24). Attorney D. James Tree represents plaintiff. Special Assistant United States Attorney David J. Burdett represents the Commissioner of Social Security (Commissioner). The parties have consented to proceed before a magistrate judge (Ct. Rec. 5). On June 16, 2010, plaintiff filed a reply (Ct. Rec. 28). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** defendant's motion for summary judgment (Ct. Rec. 24) and **DENIES** plaintiff's motion for summary judgment (Ct. Rec. 15).

JURISDICTION

Plaintiff protectively applied for supplemental security

1 income (SSI) on January 24, 2005¹, alleging onset as of April 23,
2 2001, due to "[lower extremities] edema, legs are shot, limited
3 mobility," knee pain, venous insufficiency, degenerative joint
4 disease, obesity, hypertension, hyperlipidemia, and a history of
5 gout (Tr. 62-64, 72, 124, 126, 129, 479). The application was
6 denied initially and on reconsideration (Tr. 43-44, 47-50). At a
7 hearing before Administrative Law Judge (ALJ) Paul Gaughen on July
8 25, 2007, plaintiff, represented by counsel, and a vocational
9 expert testified (Tr. 474-494). On August 20, 2007, the ALJ issued
10 an unfavorable decision (Tr. 15-25). The Appeals Council denied
11 review on April 15, 2009 (Tr. 6-8). Therefore, the ALJ's decision
12 became the final decision of the Commissioner, which is appealable
13 to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff
14 filed this action for judicial review pursuant to 42 U.S.C. §
15 405(g) on June 12, 2009 (Ct. Rec. 1).

16 **STATEMENT OF FACTS**

17 The facts have been presented in the administrative hearing
18 transcripts, the ALJ's decision, the briefs of the parties, and
19 are summarized here where relevant.

20 Plaintiff was 48 years old when he filed his current
21 application and 51 at the 2007 hearing (Tr. 23, 478, 487).
22 Plaintiff graduated from high school and completed one quarter of
23 community college, has never married, and lives alone (Tr. 21, 76,
24 180, 326, 384, 478-479). Mr. Stanford worked as a garbage
25

26 ¹Plaintiff filed a previous application on January 23, 2002
27 (Tr. 278-281). The court's discussion is limited to the current
28 application, except where noted with respect to plaintiff's
Chavez res judicata claim.

1 collector, fast food worker, and general laborer/construction
2 worker (Tr. 73-74, 81-82, 88-91, 95). In February 2005 he reports
3 he worked at a fair for ten days and as a bell ringer for a month
4 (Tr. 95, 483-486).

5 Mr. Sanford does not drive because he does not own a car and
6 has no license. He rides the bus or his bike daily. Six days a
7 week plaintiff has coffee or soda in the morning with friends at
8 fast food restaurants (Tr. 96, 101, 227, 480-481). He likes to
9 ride the bus all over town. Plaintiff spends a couple of hours in
10 the library 3-4 times a week (Tr. 96, 101, 327). He cooks, does
11 laundry, and mops. He enjoys watching soccer in the parks and
12 going to local lakes (Tr. 99, 101, 328). Mr. Sanford quit drinking
13 three and a half years before the 2007 hearing. He attends AA
14 occasionally (Tr. 486).

15 Plaintiff cannot stand or walk very long because he
16 experiences swelling and his legs and joints give out (Tr. 72, 98,
17 102). He can stand 5-10 minutes twice a day, walk 100 yards twice
18 a day, and carry 20 pounds (Tr 479, 486). He wears therapeutic
19 stockings (Tr. 479). At times he suffers depression and anxiety
20 (Tr. 482).

21 SEQUENTIAL EVALUATION PROCESS

22 The Social Security Act (the Act) defines disability
23 as the "inability to engage in any substantial gainful activity by
24 reason of any medically determinable physical or mental impairment
25 which can be expected to result in death or which has lasted or
26 can be expected to last for a continuous period of not less than
27 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act
28 also provides that a Plaintiff shall be determined to be under a

1 disability only if any impairments are of such severity that a
2 plaintiff is not only unable to do previous work but cannot,
3 considering plaintiff's age, education and work experiences,
4 engage in any other substantial gainful work which exists in the
5 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
6 Thus, the definition of disability consists of both medical and
7 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
8 (9th Cir. 2001).

9 The Commissioner has established a five-step sequential
10 evaluation process for determining whether a person is disabled.
11 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
12 is engaged in substantial gainful activities. If so, benefits are
13 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
14 the decision maker proceeds to step two, which determines whether
15 plaintiff has a medically severe impairment or combination of
16 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

17 If plaintiff does not have a severe impairment or combination
18 of impairments, the disability claim is denied. If the impairment
19 is severe, the evaluation proceeds to the third step, which
20 compares plaintiff's impairment with a number of listed
21 impairments acknowledged by the Commissioner to be so severe as to
22 preclude substantial gainful activity. 20 C.F.R. §§
23 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
24 App. 1. If the impairment meets or equals one of the listed
25 impairments, plaintiff is conclusively presumed to be disabled.
26 If the impairment is not one conclusively presumed to be
27 disabling, the evaluation proceeds to the fourth step, which
28 determines whether the impairment prevents plaintiff from

1 performing work which was performed in the past. If a plaintiff is
2 able to perform previous work, that Plaintiff is deemed not
3 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
4 this step, plaintiff's residual functional capacity (RFC)
5 assessment is considered. If plaintiff cannot perform this work,
6 the fifth and final step in the process determines whether
7 plaintiff is able to perform other work in the national economy in
8 view of plaintiff's residual functional capacity, age, education
9 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
10 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

11 The initial burden of proof rests upon plaintiff to establish
12 a *prima facie* case of entitlement to disability benefits.
13 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
14 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
15 met once plaintiff establishes that a physical or mental
16 impairment prevents the performance of previous work. The burden
17 then shifts, at step five, to the Commissioner to show that (1)
18 plaintiff can perform other substantial gainful activity and (2) a
19 "significant number of jobs exist in the national economy" which
20 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
21 Cir. 1984).

22 STANDARD OF REVIEW

23 Congress has provided a limited scope of judicial review of a
24 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
25 the Commissioner's decision, made through an ALJ, when the
26 determination is not based on legal error and is supported by
27 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
28 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).

1 "The [Commissioner's] determination that a plaintiff is not
2 disabled will be upheld if the findings of fact are supported by
3 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
4 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is
5 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
6 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
7 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
8 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
9 573, 576 (9th Cir. 1988). Substantial evidence "means such
10 evidence as a reasonable mind might accept as adequate to support
11 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
12 (citations omitted). "[S]uch inferences and conclusions as the
13 [Commissioner] may reasonably draw from the evidence" will also be
14 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
15 review, the Court considers the record as a whole, not just the
16 evidence supporting the decision of the Commissioner. *Weetman v.*
17 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v.*
18 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

19 It is the role of the trier of fact, not this Court, to
20 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
21 evidence supports more than one rational interpretation, the Court
22 may not substitute its judgment for that of the Commissioner.
23 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
24 (9th Cir. 1984). Nevertheless, a decision supported by substantial
25 evidence will still be set aside if the proper legal standards
26 were not applied in weighing the evidence and making the decision.
27 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
28 433 (9th Cir. 1987). Thus, if there is substantial evidence to

1 support the administrative findings, or if there is conflicting
2 evidence that will support a finding of either disability or
3 nondisability, the finding of the Commissioner is conclusive.
4 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

5 **ALJ'S FINDINGS**

6 At step one the ALJ found Mr. Sanford has not engaged in
7 substantial gainful activity since onset on April 23, 2001 (Tr.
8 17). At steps two and three, he found plaintiff suffers from
9 obesity and venous stasis causing some lower extremity edema,
10 impairments that are severe but which do not meet or medically
11 equal a Listed impairment (Tr. 17, 20). At step four, relying on
12 the VE, ALJ Gaughen found plaintiff cannot perform his past
13 relevant work (Tr. 23, 488). At step five, again relying on the
14 VE, he found plaintiff can work at other jobs, such as parking lot
15 attendant, basket filler, and bench assembler (Tr. 24, 488).
16 Accordingly, the ALJ found plaintiff is not disabled as defined by
17 the Social Security Act (Tr. 24-25).

18 **ISSUES**

19 Plaintiff contends the Commissioner erred at step two by
20 failing to find Mr. Sanford suffers severe psychological
21 impairments. Citing *Chavez*, plaintiff contends the ALJ failed to
22 apply res judicata as required with respect to a 2003 decision
23 limiting Mr. Sanford to sedentary work. And plaintiff alleges the
24 ALJ failed to include all of Mr. Sanford's impairments in a
25 hypothetical (Ct. Rec. 13 at 13-19). The Commissioner responds the
26 ALJ's decision is supported by the evidence and free of error,
27 including ALJ Gaughen's step two and RFC determinations. He asks
28 the Court to affirm (Ct. Rec. 25 at 4-23).

1 DISCUSSION

2 **A. Weighing medical evidence - standards**

3 In social security proceedings, the claimant must prove the
4 existence of a physical or mental impairment by providing medical
5 evidence consisting of signs, symptoms, and laboratory findings;
6 the claimant's own statement of symptoms alone will not suffice.
7 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
8 on the basis of a medically determinable impairment which can be
9 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
10 medical evidence of an underlying impairment has been shown,
11 medical findings are not required to support the alleged severity
12 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cr.
13 1991).

14 A treating physician's opinion is given special weight
15 because of familiarity with the claimant and the claimant's
16 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
17 1989). However, the treating physician's opinion is not
18 "necessarily conclusive as to either a physical condition or the
19 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
20 751 (9th Cir. 1989)(citations omitted). More weight is given to a
21 treating physician than an examining physician. *Lester v. Cater*,
22 81 F.3d 821, 830 (9th Cir. 1996). Correspondingly, more weight is
23 given to the opinions of treating and examining physicians than to
24 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
25 (9th Cir. 2004). If the treating or examining physician's opinions
26 are not contradicted, they can be rejected only with clear and
27 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
28 ALJ may reject an opinion if he states specific, legitimate

1 reasons that are supported by substantial evidence. See *Flaten v.*
2 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9th Cir.
3 1995).

4 In addition to the testimony of a nonexamining medical
5 advisor, the ALJ must have other evidence to support a decision to
6 reject the opinion of a treating physician, such as laboratory
7 test results, contrary reports from examining physicians, and
8 testimony from the claimant that was inconsistent with the
9 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
10 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
11 Cir. 1995).

12 **B. Step two**

13 In social security proceedings, the claimant must prove the
14 existence of a physical or mental impairment by providing medical
15 evidence consisting of signs, symptoms, and laboratory findings;
16 the claimant's own statement of symptoms alone will not suffice.
17 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
18 on the basis of a medically determinable impairment which can be
19 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
20 medical evidence of an underlying impairment has been shown,
21 medical findings are not required to support the alleged severity
22 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cr.
23 1991).

24 An impairment or combination of impairments may be found "not
25 severe only if the evidence establishes a slight abnormality that
26 has no more than a minimal effect on an individual's ability to
27 work." *Webb. Barnhart*, 433 F.3d 683, 686-687 (9th Cir. 2005)
28 (citing *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996); see
also *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988). If an

1 adjudicator is unable to determine clearly the effect of an
2 impairment or combination of impairments on the individual's
3 ability to do basic work activities, the sequential evaluation
4 should not end with the not severe evaluation step. S.S.R. No. 85-
5 28 (1985). Step two, then, is "a de minimus screening device
6 [used] to dispose of groundless claims," *Smolen*, 80 F.3d at 1290,
7 and an ALJ may find that a claimant lacks a medically severe
8 impairment or combination of impairments only when his conclusion
9 is "clearly established by medical evidence." S.S.R. 85-28. The
10 question on review is whether the ALJ had substantial evidence to
11 find that the medical evidence clearly established that the
12 claimant did not have a medically severe impairment or combination
13 of impairments. *Webb*, 433 F.3d at 687; *see also Yuckert*, 841 F.2d
14 at 306.

15 The procedural history is significant. At the hearing in
16 2003, expert Norman Gustavson testified although plaintiff at
17 times has been diagnosed with schizoid personality disorder, the
18 basis for the diagnosis is unclear and there is nothing in the
19 record to substantiate it (Tr. 463, 467). Accordingly, he
20 recommended the ALJ refer plaintiff for a comprehensive
21 assessment, including MMPI and MAST (substance abuse) testing (Tr.
22 468-469). At the hearing Mr. Sanford conferred with counsel.
23 Thereafter, plaintiff's attorney told the ALJ Mr. Sanford is "not
24 going to do the assessment" (Tr. 470). At the most recent hearing
25 in 2007, the ALJ asked initially if updated behavioral health and
26 clinical records were obtained. Counsel replied "we have
27 everything that's out there" (Tr. 475).

28 Plaintiff argues at step two the ALJ should have found Mr.
Sanford suffers from the severe psychological impairments of

1 schizoid personality disorder and anxiety (Ct. Rec. 16 at 16; 28
2 at 6-7). The Commissioner responds the ALJ properly found
3 plaintiff's psychological conditions are not severe because
4 Christopher Clark, M.Ed., LMCH, is not an acceptable diagnostic
5 source. In addition, in the past Mr. Clark diagnosed plaintiff
6 with malingering, and has opined plaintiff appeared motivated by
7 secondary gain rather than a desire to obtain mental health
8 treatment² (Ct. Rec. 25 at 4-9).

9 Plaintiff relies on Mr. Clark's April 2007 evaluation. Mr.
10 Clark points out plaintiff does not endorse significant symptoms
11 of depression. He has not taken psychotropic medication in many
12 years and, in any event, did not find it helpful (Tr. 177).
13 Plaintiff sees his primary doctor every two months, feels his
14 general health is good, meditates to manage anxiety, says nothing
15 has changed in his life, and he does not feel stressed (Tr. 177-
16 178). Intellectual functioning is average, hygiene adequate,
17 speech and body movement normal, judgment fair, and cognition
18 intact (Tr. 178-179). Plaintiff is bored by repetitive tasks (Tr.
19 181) and appears unstressed by his lack of social support. Mr.
20 Clark describes plaintiff as guarded and evasive, noting Mr.
21 Sanford "continues to be invested in receiving long-term
22 disability benefits" (Tr. 178). Mr. Clark diagnosed dysthymia,
23 early onset, moderate, anxiety disorder NOS, personality disorder
24 NOS, and alcohol abuse in reported remission (Tr. 180). His

26 ²Since 1986 mental health services have been closed at
27 intake as "not needed" (Tr. 20, 348, Ex. B5F). In 1998 plaintiff
28 complained at intake he did not see why he couldn't "get a crazy
check like them other guys," so he came down here [to Central
Washington Comprehensive Mental Health] to give it a try
(Tr. 349).

1 assessed GAF of 48 indicates serious symptoms or functional
2 impairment (Tr. 181). Because Mr. Sanford did not meet "access to
3 care criteria" for behavioral health services, Mr. Clark notes he
4 is terminated at intake (Tr. 181). Mr. Clark assessed severe,
5 marked, and moderate limitations (Tr. 183-184). He opined while
6 plaintiff is "not exactly malingering in nature," he is very
7 inadequate in areas of social and occupational functioning with a
8 very poor prognosis (Tr. 185). Mr. Clark conducted this 2007
9 evaluation at the request of Mr. Sanford's attorney (Tr. 177).

10 Mr. Clark also assessed plaintiff in 2002 (Tr. 384-387) and
11 2006 (Tr. 139-142, corrected version at Tr. 161-164). After the
12 2002 evaluation, Mr. Clark noted plaintiff was "openly invested in
13 securing supportive disability benefits and asking if his present
14 complaints warrant[ed] a completely disabling condition" (Tr.
15 385). He quits jobs or gets fired due to insubordination or lack
16 of attendance (Tr. 384), is not interested in mental health
17 treatment, and takes no prescribed psychotropic medication (Tr.
18 387). Mr. Clark diagnosed malingering and continuous alcohol
19 dependence, among other disorders. He opined plaintiff "probably
20 doesn't have the ability to maintain employment" (Tr. 387).

21 The ALJ considered plaintiff's credibility when he weighed
22 the conflicting evidence of psychological impairment.

23 **C. Credibility**

24 To aid in weighing the conflicting medical evidence, the ALJ
25 evaluated plaintiff's credibility and found him generally
26 credible, but noted his described daily activities are not as
27 limited as expected given complaints of disabling symptoms and
28 limitations (Tr. 22-23). Credibility determinations bear on
evaluations of medical evidence when an ALJ is presented with

1 conflicting medical opinions or inconsistency between a claimant's
2 subjective complaints and diagnosed condition. *Webb v. Barnhart*,
3 433 F.3d 683, 688 (9th Cir. 2005).

4 It is the province of the ALJ to make credibility
5 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
6 1995). However, the ALJ's findings must be supported by specific
7 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
8 1990). Once the claimant produces medical evidence of an
9 underlying medical impairment, the ALJ may not discredit testimony
10 as to the severity of an impairment because it is unsupported by
11 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
12 1998). Absent affirmative evidence of malingering, the ALJ's
13 reasons for rejecting the claimant's testimony must be "clear and
14 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

15 "General findings are insufficient: rather the ALJ must
16 identify what testimony is not credible and what evidence
17 undermines the claimant's complaints." *Lester*, 81 F.3d at 834;
18 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

19 The ALJ relied on plaintiff's activities inconsistent with
20 the degree of limitation alleged (Tr. 22-23). Plaintiff testified
21 he rides his bike, rides the city bus daily for 3 to 5 hours, is
22 friends with the bus drivers, goes to the library, cooks dinner,
23 and watches television. He can pick up and carry about 20 pounds.
24 He worked for 8 or 9 days at the fair in early fall and for the
25 Salvation Army for more than a month during the winter (Tr. 21-
26 23). The ALJ observes plaintiff's testimony he is unable to work
27 due to his weight and "physically unable to work" is inconsistent
28 with his daily activities (Tr. 21-22). Activities inconsistent
with claimed disabling impairments diminish credibility. *Thomas v.*

1 *Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002).

2 The ALJ properly considered plaintiff's diagnosed malingering
3 and repeated references to secondary gain motivation when he
4 assessed credibility (Tr. 19-22), additional factors an ALJ can
5 consider. *Matney v. Sullivan*, 981 F.2d 1016, 1020 (9th Cir. 1992).
6 Although not required given the evidence of malingering, the ALJ's
7 reasons supporting his credibility assessment clear, convincing,
8 and supported by substantial evidence. *Rollins v. Massanari*, 261
9 F.3d 853, 857 (9th Cir. 2001).

10 Plaintiff fails to meet his burden at step two of
11 establishing he suffers from a severe mental impairment. He failed
12 to undergo MMPI or MAST testing, objective testing to clarify the
13 existence of a severe mental impairment. He does not receive (and
14 is ineligible to receive) mental health treatment. He takes no
15 psychotropic medications. The ALJ's step two finding is fully
16 supported by the record.

17 To the extent treating, examining and reviewing professionals
18 assess mental limitations, the ALJ properly rejects them as
19 contradicted by plaintiff's own testimony (i.e., Mr. Clark reports
20 plaintiff is phobic in social situations, contrary to Mr.
21 Sanford's testimony and disability report stating he rides the bus
22 daily and is friends with the drivers (Tr. 23, Exhibit B3F).

23 The ALJ notes plaintiff has not required any professional
24 mental health treatment, nor was it recommended after repeated
25 evaluations (Tr. 20). The lack of mental health treatment is
26 another specific legitimate reason to discredit assessed severe,
27 marked and moderate limitations. *See Burch v. Barnhart*, 400 F.3d
28 676 (9th Cir. 2005); *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th
Cir. 2005).

1 To the extent the ALJ rejected the contradicted opinions of
2 some of the professionals, his reasons are legitimate, specific,
3 and supported by substantial evidence in the record. *See Lester v.*
4 *Chater*, 81 F.3d 821, 830-831 (9th Cir. 1995)(the ALJ must make
5 findings setting forth specific, legitimate reasons for rejecting
6 the treating or examining physician's contradicted opinion).

7 The ALJ is responsible for reviewing the evidence and
8 resolving conflicts or ambiguities in testimony. *Magallanes v.*
9 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). It is the role of the
10 trier of fact, not this court, to resolve conflicts in evidence.
11 *Richardson*, 402 U.S. at 400. The court has a limited role in
12 determining whether the ALJ's decision is supported by substantial
13 evidence and may not substitute its own judgment for that of the
14 ALJ, even if it might justifiably have reached a different result
15 upon de novo review. 42 U.S.C. § 405 (g).

16 The ALJ's step two determination is supported by the record
17 and free of error.

18 **D. Chavez**

19 Citing *Chavez v. Bowen*, 844 F.2d 691 (9th Cir. 1988),
20 plaintiff alleges the ALJ erred when he assessed an RFC for a
21 range of light work. Plaintiff alleges ALJ Gaughen was bound by
22 another ALJ's 2003 decision limiting Mr. Sanford to sedentary work
23 (Ct. Rec. 16 at 13-16), a determination which, if credited, would
24 dictate a finding of disability pursuant to Rule 201.12 of the
25 Medical-Vocational Guidelines (Grids). The Commissioner responds
26 ALJ Gaughen was not bound by the earlier determination essentially
27 because circumstances changed between the two decisions, namely,
28 plaintiff's condition improved (Ct. Rec. 25 at 14-19).

"The principles of res judicata apply to administrative

1 decisions, although the doctrine is applied less rigidly to
2 administrative proceedings than to judicial proceedings." *Chavez*
3 *v. Bowen*, 844 F.2d 691, 693 (9th Cir. 1988). An ALJ's finding that
4 a claimant is not disabled creates a presumption of nondisability.
5 *Lester v. Chater*, 81 F.3d 821, 827 (9th Cir. 1995). The
6 presumption does not apply, however, if there are changed
7 circumstances. *Taylor v. Heckler*, 765 F.2d 872, 875 (9th Cir.
8 1985). A previous ALJ's findings concerning residual functional
9 capacity, education, and work experience are entitled to some res
10 judicata consideration and such findings cannot be reconsidered by
11 a subsequent judge absent new information not presented to the
12 first judge. *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1173 (9th
13 Cir. 2008), *citing Chavez*, 844 F.2d at 694.

14 In this case the ALJ elected not to open the prior
15 application. Mr. Clark evaluated plaintiff twice after the 2003
16 decision. Records from treatment providers, including plaintiff's
17 primary doctor, Dr. Shah, are dated after the 2003 decision. These
18 records necessarily presented new and material information not
19 presented to the first ALJ. *See Stubbs*, 539 F.3d at 1173. ALJ
20 Gaughen was not required to give the 2003 RFC for sedentary work
21 preclusive effect in light of the new and material information.

22 **E. Hypothetical**

23 Plaintiff next alleges the ALJ should have included mental
24 limitations in his hypothetical. This restates the step two
25 argument previously addressed (Ct. Rec. 16 at 18).

26 Plaintiff asserts the ALJ should have limited him to
27 sedentary work as assessed by "the treating doctors" and
28 consultants (Ct. Rec. 16 at 18). The ALJ weighed the evidence and
rejected opinions contradicted by plaintiff's admitted activities

1 and capabilities. An "ALJ may discredit treating physicians'
2 opinions that are conclusory, brief, and unsupported by the record
3 as a whole or by objective medical findings." *Batson v. Comm'r*,
4 359 F.3d 1190, 1195 (9th Cir. 2003). The ALJ's assessment of
5 plaintiff's physical capabilities and the medical opinions is
6 supported by the record as a whole and free of error.

7 The record supports ALJ Gaughen's step two, credibility, and
8 RFC determinations. His decision is based on substantial evidence
9 and free of legal error.

10 CONCLUSION

11 Having reviewed the record and the ALJ's conclusions, this
12 court finds that the ALJ's decision is free of legal error and
13 supported by substantial evidence..

14 IT IS ORDERED:

15 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 24**) is
16 **GRANTED.**

17 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 15**) is
18 **DENIED.**

19 The District Court Executive is directed to file this Order,
20 provide copies to counsel for the parties, **enter judgment in favor**
21 **of Defendant**, and **CLOSE** the file.

22 DATED this 10th day of September, 2010.

23 s/ James P. Hutton

JAMES P. HUTTON

24 UNITED STATES MAGISTRATE JUDGE
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